waters." This Court has held that the constitutional source of congressional power over the use of "navigable waters" comes both from the Commerce Clause, Article I, Section 8, Clause 3 (Commerce Clause) and the Admiralty Clause. *Gilman v. Philadelphia*, 70 U.S. 713, 724-725 (1866) ("The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . .") The federal government has jurisdiction over the "navigable waters" of the United States independent of the Commerce Clause through the Admiralty Clause which implicitly contains three grants of power to the federal government:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

Romero v. International Term Co., 358 U.S. 354, 361-2 (1959) citing *Crowell v. Benson*, 285 U.S. 22, 55 (1932). Even if Congress had never enacted a single substantive law affecting the navigable waters of the United States, the use of those navigable waters of the United States would still be governed by federal law through the Admiralty Clause. If there were no federal statutes, the Constitution still left power

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convenience and general prosperity. Paraphrasing *Black's Law Dictionary* (Eighth Edition, 2004). Inherent in police powers is the right to prior restraint and the right to punish for conduct where no harm to a third party has yet occurred. Police powers are distinct from the right to provide a remedy to a private party after that private party has been injured.

to the federal courts to develop the substantive admiralty/maritime law.[5] *Romero*, 358 at 361-2.

Once Congress enacts a law governing the use of the navigable waters of the United States, that law becomes part of the substantive admiralty/maritime laws of the United States. This Court has often said: "With admiralty jurisdiction comes the application of substantive admiralty law." *Great Lakes Dredge & Dock*, 527 at 545; *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996); *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). The converse must also be true: With the application of substantive admiralty law comes admiralty jurisdiction. When the question of law is whether a location is part of the "navigable waters of the United States" that question is an admiralty/maritime law question and that question has a constitutional answer.

A. What is or is not "navigable waters" determines the boundaries of what falls within the scope of admiralty/maritime jurisdiction.

The question of what constitutes the "navigable waters of the United States" has always been intertwined with the scope of admiralty/maritime jurisdiction. For most of the history of this nation the jurisdictional test for admiralty/maritime torts was the simple bright line *situs* test outlined in *The Daniel Ball*.[6] As this Court often said "The traditional test for admi-

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[5] While not relevant to this case, a significant amount of the federal admiralty/maritime law is developed through international treaty. *United States v. Locke*, 529 U.S. 89 (2000).

[6] The admiralty/maritime jurisdiction applies to both torts and contracts. The jurisdictional test for contracts has traditionally been a nexus test. *The Jefferson*, 61 U.S. 393, 401 (1857) ("The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.")

ralty tort jurisdiction asked only whether the tort occurred on navigable waters. If it did, admiralty jurisdiction followed; if it did not, admiralty jurisdiction did not exist." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-2 (1995). *See also Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 253 (1972) ("If the wrong occurred on navigable waters, the action is within admiralty jurisdiction.")(citing *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813) (Story, J., on Circuit). *See also The Plymouth*, 70 U.S. 20, 36 (1866) ("Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance"). *See generally Great Lakes Dredge & Dock*, 513 U.S. 527 (1995) for a discussion of the evolution of admiralty/maritime tort jurisdiction.

Some members of this Court would return to this bright line rule for admiralty/maritime jurisdiction. *See Great Lakes Dredge & Dock*, 513 U.S. at 549 (Justices Thomas and Scalia concurring in judgment). What is relevant to this case is that the starting point for determining federal admiralty/maritime jurisdiction under any test ever used by the Court is whether the location is "navigable waters of the United States." Therefore, any shift in what constitutes the "navigable waters of the United States" potentially could shift the admiralty/maritime jurisdictional of the United States.

B. Federal power over the use of the navigable waters of the United States is exclusive.

States have extremely limited police powers over the use of navigable waters. The police powers over the use of the navigable waters of the United States is vested exclusively in the federal government through the Admiralty Clause:

> By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress

> intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The New Jersey Steam Navigation Company, v. The Merchants' Bank or Boston, 47 U.S. 344, 390 (1848).

> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states-not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

Knickerbocker at 160-161, quoting from *The Lottawanna*, 88 U.S. 558, 574-5 (1874).

The constitutional principle that federal admiralty/maritime jurisdiction over the use of the navigable waters of the United States is exclusive is also reflected in statute. One of the first actions of the first Congress was to create the lower federal courts in The Judiciary Act of 1789:

> And be it further enacted, That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of

> ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

The Judiciary Act of 1789: An Act to establish the Judicial Courts of the United States, 1 Stat. 73, Section 9 (September 24, 1789) (The Judiciary Act). The admiralty/maritime components of *The Judiciary Act* are now codified in Title 28 of the United States Code:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Admiralty, maritime and prize cases, 28 U.S.C. § 1333. The second phrase of clause (1)—"saving to suitors in all cases all other remedies to which they are otherwise entitled"—is referred to as the "saving to suitors" clause and has lead to some confusion over what jurisdiction states retain. The modern view is that states are left with two authorities:

First, states are authorized to have their courts accept jurisdiction over admiralty/maritime cases. *See Romero.* Concurrent federal/state court jurisdiction allows state courts to hear admiralty/maritime claims just as they hear most other federal questions. But state court must apply federal admiralty/maritime law, not state law, when sitting as admiralty courts.

Second, states are authorized to provide remedies to suitors. Originally, this authority was limited to rights that were available at common law at the time the Constitution was

adopted. In more recent years, this right has been amended by Congress to include remedies that individuals "are otherwise entitled" where no federal admiralty/maritime remedies are otherwise available. A state may provide remedies "so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561 (1954) *quoting Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

As a bottom line, once admiralty/maritime jurisdiction attaches, the Constitution and laws of the United States severely limit state powers. *United States v. Locke*, 529 U.S. 89 (2000) ("The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.") citing *The Federalist* Nos. 44, 12, 64.

Declaring a location to be part of the navigable waters of the United States has the corollary effect of removing state police powers over the use of that location. If the navigable waters of the United States are expanded in scope, the admiralty/maritime jurisdiction also expands to the exclusion of the states.

C. Federal power over the use of the navigable waters of the United States is nondelegable.

Expanding the definition of what constitutes the "navigable waters of the United States" has far more implications that would an expansive reading of other statutory language. Not only is federal power over the use of the "navigable waters of the United States" exclusive as outlined above in section B, once federal admiralty/maritime power attaches, it cannot be delegated to the states. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) ("Congress cannot transfer its legisla-

tive power [over admiralty/maritime matters] to the states-by nature this [admiralty/maritime power] is non-delegable.")

As background to this proposition, when workers' compensation statutes were first enacted, states attempted to apply their workers' compensation laws to work place injuries that would otherwise have been maritime torts. This Court struck down this aspect of state workers' compensation laws in *Southern Pacific Rail Co. v. Jensen*, 244 U.S. 205, 217 (1917), rejecting an argument that such laws could be applied under the saving to suitors clause discussed above. After *Jensen*, Congress amended the saving to suitors clause to expressly authorize states to apply their workers' compensation laws to maritime workplace torts. In *Knickerbocker*, this Court again ruled against applying state workers' compensation laws in the admiralty/maritime context holding that power under the Admiralty Clause is "non-delegable." *Knickerbocker*, 253 at 160. Ultimately, Congress decided to cover maritime injuries under a federal workers' compensation statute. *LHWCA*, 33 U.S.C. 901 *et seq.* To this day, admiralty/maritime injuries are covered by federal law.

While this Court has not since revisited the question of delegation under the Admiralty Clause, the Court has repeatedly supported the principle that was the underpinning of the holding in *Knickerbocker*:

> The fundamental interest giving rise to maritime jurisdictions is "the protection of maritime commerce," and we have said that that interest cannot be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct."

Sisson v. Ruby, 497 U.S. 358, 367 (1990), quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

The holding that Commerce Clause powers are delegable, while Admiralty Clause powers are non-delegable is consistent with the structure of the Constitution. As a general rule,

Congress can delegate powers that the Constitution otherwise gives to Congress. The power to regulate commerce is found in Article I of the Constitution and as such, is a power of Congress. Congress cannot delegate powers that the Constitution assigns to the other two branches of the federal government. Since the Admiralty Clause is a federal power given first and foremost to the federal courts in Article III, Congress is without authority to place any of admiralty/maritime power in the states—i.e., it is non-delegable.

III. THE EXECUTIVE BRANCH IS WITHOUT AUTHORITY TO INTERPRET A TERM THAT THE COURTS HAVE ALREADY INTERPRETED.

Amicus submits that any Executive Branch interpretations of the term "navigable waters" should be irrelevant to the Court's inquiry. Executive branch regulation on this point should not even be considered by the Court. *Amicus* advances two grounds for this position: First, no executive branch interpretation of the term "navigable waters" is permissible because the meaning of the term was clear and well established at the time of enactment of the CWA. Second, because the term "navigable waters" and phrase "waters of the United States" have constitutional importance, it is the courts and not the executive branch that have the sole authority to establish the appropriate legal test.

A. No alternative executive branch interpretation of a term is allowed when the interpretation of the term is clear at the time of enactment.

The question of when executive branch regulations are relevant to a judicial enquiry is governed by the Administrative Procedures Act, 5 U.S.C. 551 *et seq.* (APA):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

> law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .

APA, 5 U.S.C. § 706(2). Under the APA, it is the responsibility of the courts to decide questions of law and interpret constitutional and statutory provisions. *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") The Court addressed this issue in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (internal citations omitted).

As has been demonstrated above, the intent of Congress when it used the term "navigable waters" and the phrase "waters of the United States" could not have been clearer. It would be hard to find other words that have been more

thoroughly defined over our nation's history. In the language of *Chevron*, once Congress used the term "navigable waters" and the phrase "waters of the United States," "that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 at 842.

While the so-called *Chevron* doctrine encompasses a general principle of deference to agency decisions, an agency is not automatically entitled to deference:

> But the principle [of deference] has its limits. Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question and then only if the administrative interpretation is reasonable.

Presley v. Etowah County Comm'n, 502 U.S. 491, 508-509 (1992) (emphasis added) citing *Chevron*, 837 at 842-844. In the case at hand, Congress has clearly expressed its intent by using a term that has a long established meaning. Any other interpretation that is inconsistent with that long established meaning is simply not reasonable.

B. The Courts are the sole source of interpreting what is and is not a navigable water.

Furthermore, the Constitution has delegated to the Courts the authority to define the legal test for what is and is not "navigable waters" and what are and are not the "waters of the United States." Congress is without authority to take that power away from the courts and delegate that power instead to the Executive Branch or usurp that power for itself. *The Steamer St. Lawrence*, 66 U.S. 522, 527 (1862):

> This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same

> territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; *but certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.* And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.

(emphasis added.)

In further support of this proposition consider this hypothetical—Congress gives the Executive Branch statutory authority to conduct "reasonable searches and seizures" along with authority to issue regulations. Could it seriously be argued that the Executive Branch would be free to issue regulations defining what is an unreasonable search and seizure in a way that violated the meaning given to that term by the courts? Would such regulation be entitled to deference? The answer is of course not. Likewise, no Act of Congress can give a federal agency the right to "overrule" this Court's legal test for what constitutes the "waters of the United States."

To the extent an administrative agency conducts a fact based adjudication and determines that certain waters are or are not navigable, such a determination may be entitled to deference under the *APA*. But only the federal courts have to power to define what legal test will be used to establish what waters are the "waters of the United States." The Constitution delegated that power to the federal courts and Congress is without constitutional authority to give that power to the Executive Branch.

Thus, for the reasons outlined above, administrative regulations on what constitutes "navigable waters" and "waters of

the United States" are irrelevant to this inquiry. The Court should instead look to its own decisions when deciding this case and the controlling authority is *The Daniel Ball* and it progeny.

IV. THE FEDERAL COURTS AND CONGRESS HAVE CONSISTENTLY USED THE TERM "NAVIGABLE WATERS" AND PHRASE "WATERS OF THE UNITED STATES" IN THEIR ADMIRALTY/MARITIME CONTEXT.

For most of the history of this nation, the federal courts and Congress have used the term "navigable waters" and the phrase "waters of the United States" to delineate the boundary between federal admiralty/maritime jurisdiction and state non-admiralty jurisdiction. The question repeatedly confronted by the Court is whether a given location in our nation is part of the "navigable waters of the United States." In the early case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court discussed what constitutes "waters of the United States:"

> It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their use, for those purposes, seemed to be entrusted to the exclusive power of Congress.

Gibbons at 21. The Court went on to conclude what constitutes "waters of the United States" is a function of whether or not those waters are navigable:

> It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned. Their use is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters.

Gibbons at 22. That principle that "navigable waters" are the "waters of the United States" has been a bedrock principle of

federal law ever since. The Court outlined the test for what are and are not "navigable waters" of the United States in *The Daniel Ball*, 77 U.S. 557 (1870) and *The Montello*, 87 U.S. 430 (1874). Of significance to this case is that *The Daniel Ball* involved the interpretation of a statute that used the phrase "navigable waters of the United States:"

> The act of July 7th, 1838, provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon the bays, lakes, rivers, or other navigable waters of the United States . . . .

The Daniel Ball at 558. The Court went on to address the issue of what constitutes "navigable waters of the United States:"

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball at 563. A few years later in *The Montello*, 87 U.S. 430 (1874), this Court went on to further define what is and is not part of the "navigable waters of the United States:"

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public high-

> way. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The Montello at 441-2.

Since *The Daniel Ball*, the same test has been used by the federal courts to evaluate what constitutes "navigable waters," whether evaluating statutes or constitutional questions. In *Economy Light & Power Co. v. U.S.*, 256 U.S. 113 (1921), this Court interpreted a statute using the term "navigable waters" and the phrase "navigable waters of the United States." This Court as always looked to *The Daniel Ball*:

> The Circuit Court of Appeals, in passing upon the question of navigability, correctly applied the test laid down by this court in *The Daniel Ball* and *The Montello*; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation

be open at all seasons of the year, or at all stages of the water.

Economy Light at 121-2. *See also U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940):

> It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the navigable waters of the United States open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is "absolute."
>
> The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers." It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.
>
> The navigability of the New River is, of course, a factual question but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the

> Western mountains. The tests as to navigability must take these variations into consideration.

Appalachian Electric at 404-6.

At the time Congress used the term "navigable waters" in the CWA and defined that term to be the "waters of the United States," Congress knew what that term meant. Congress has used that term for over 100 years in statute after statute. This Court has interpreted that term in statute after statute and in numerous constitutional cases so there was no question of the meaning.

One definition of insanity is doing the same thing over and over again and expecting a different result. It would be insanity for Congress to have used a term that this Court had interpreted the same way over and over again and expect the Court to reach a different conclusion. If Congress had intended a different jurisdictional reach for the CWA, Congress undoubtedly would have used a different term to define that jurisdictional reach.

A. Congress repeatedly used the term "navigable waters" and the phrase "navigable waters of the United States."

Not only has the term "navigable waters" and the phrase "waters of the United States" been used for over 100 years in statutes, the term and phrase are still found in numerous other federal statutes today. *See* Title 33 of the United States Code generally covering Navigation and Navigable Waters, including 33 U.S.C. 1 ("It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States . . ."); 33 U.S.C. 10 ("All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."); 33 U.S.C. 59b ("Bayou Terrebonne west of Barrow Street and Bayou LeCarpe west of the Intracoastal Waterway in the city of

Houma, State of Louisiana, are declared to be not navigable waters of the United States within the meaning of the Constitution and laws of the United States."); 33 U.S.C. 401 ("It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States . . ."); 33 U.S.C. 414(a) ("Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered . . ."); 33 U.S.C. 902(4) ("The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States . . ."); 33 U.S.C. 1222(5) (" 'Navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988.").[7]

See also Title 46 of the United States Code generally covering Shipping including 46 U.S.C. 2101(17a) (" 'navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988."); 46 U.S.C. 4301(c) ("Until there is a final judicial decision that they are navigable waters of the United States, the following waters lying entirely in New Hampshire are declared not to be waters subject to the jurisdiction of the United States within the

[7] The conclusion that the term "navigable waters" must be evaluated in light of traditional admiralty/maritime law principles is also supported by the CWA's placement in the United States Code. Many of the other federal environmental statutes are found in Title 42 of the United States Code governing The Public Health and Welfare. *See* solid waste statutes in 42 U.S.C. Chapter 82 and clean air statutes in 42 U.S.C. Chapter 85. The Clean Water Act on the other hand is found in Title 33 of the United States Code regulating Navigation and Navigable Waters. Title 33 contains a significant amount of the admiralty/maritime laws of the United States.

meaning of this section . . ."); 46 U.S.C. 4701(3) (" 'navigable waters of the United States' means waters of the United States, including the territorial sea."); 46 U.S.C. 6101(d)(1) ("This part applies to a foreign vessel when involved in a marine casualty on the navigable waters of the United States."); 46 U.S.C. 8304(g) ("A foreign vessel to which the convention described in subsection (b) of this section applies, on the navigable waters of the United States, is subject to detention under subsection (f) of this section, and to an examination that may be necessary to decide if there is compliance with the convention."); 46 U.S.C. 11108(2) ("This subsection applies to an individual . . . (B) who performs regularly-assigned duties while engaged as a master, officer, or crewman on a vessel operating on the navigable waters of more than one State.")

These examples are by no means an exhaustive list of federal statutes that use the term "navigable waters" and/or phrase "waters of the United States." Instead, they simply represent a sampling.

Over and over again, Congress has used the term "navigable waters" and/or the phrase "waters of the United States" to define the jurisdictional scope of federal statutes. Congress has repeatedly used its constitutional authority to regulation "navigable waters" to enact such legislation. Congress has used the term "navigable waters" and the phrase "waters of the United States" consistently and repeatedly in the traditional *The Daniel Ball* sense: Waters must be regarded as navigable in law which are navigable in fact and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Even the Army Corps of Engineers initially used a traditional definition of "navigable waters" in the early regulations for the CWA:

> Indeed, the Corps' original interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a)'s navigable waters to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 168 (2001). There is simply no evidence that Congress intended "navigable waters" in the CWA to mean anything other than its traditional and ordinary meaning. Therefore, the term must be given its traditional and ordinary meaning.

V. FEDERAL RESPONDENT'S POSITION

It is against this long judicial and statutory history under the Admiralty Clause that the federal respondent's position must be evaluated. The federal respondent asks this Court to ignore the almost 200 year of this Court's holdings and instead create a new category of "navigable waters." The federal respondent calls the "navigable waters" that are navigable in fact "traditional navigable waters." Brief for the United States in Opposition to Certiorari in *Rapanos v. United States*, No. 04-1034, 2-3, footnote 1. The government then asks the Court to recognize a new category of "navigable waters" under the CWA—navigable waters that are *not*

navigable in fact. Thus, if the government prevails there will be two categories of "navigable waters" under federal law: "*navigable* navigable waters" and "*non-navigable* navigable waters." The country will be confronted with "*water* waters of the United States" and "*waterless* waters of the United States."

In reviewing the federal respondent's position in this case, amicus is reminded of something that former Senator Daniel Patrick Moynahan often said: In a democracy, we each are free to have our own opinions, but we are not free to make up our own facts. In this case, the federal respondent wants to make up its own facts about what is in fact navigable. If the federal respondent prevails, it will require something like the Ministry of Truth from George Orwell's "1984" to explain to the public how dry land is in fact part of the "navigable waters of the United States." Maybe they can paraphrase the pigs in Orwell's "Animal Farm" and explain that: All land in the United States is navigable by maritime vessels, but some land is more navigable than other.[8]

The federal respondent's position in this case begs the question of whether the term "navigable waters" either (1) should be redefined under federal admiralty/maritime laws to include "*non-navigable* navigable waters;" or in the alternative (2) could be redefined under other federal admiralty/maritime laws to include "*non-navigable* navigable waters." Could a worker who got injured filling in the "non-navigable navigable waters" on Mr. Rapanos' land seek compensation under the federal LHWCA because the worker was "employed in maritime employment, in whole or in part, upon the navigable waters of the United States?" 33 U.S.C. 902(4). Or maybe Mr. Rapanos could seek federal harbor maintenance funds to maintain his land since his land would

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[8] The actual quote is "All animals are equal but some animals are more equal than others."

be part of the "navigable waters of the United States." When the state wants to exercise its police powers over Mr. Rapanos' land, can he raise the affirmative defense that the state no longer has jurisdiction over his land use because his land is part of the "navigable waters of the United States." The possibilities of new applications of old federal laws are endless if the Court recognizes the existence of "*non-navigable* navigable waters."

There is absolutely no evidence that Congress intended such an absurd result under any federal statute including the CWA. Absent some clean, unequivocal expression by Congress to the contrary, the Court should conclude that Congress intended "navigable waters" to mean the same thing the term has meant in every other context it has been uses since the adoption of the Constitution. What is navigable in law is what is navigable in fact.

CONCLUSION

For the reasons stated above, amicus urges the Court to declare that what constitutes the "navigable waters of the United States" is a question of fact, defined by the Constitution under the Admiralty Clause. The test outlined in *The Daniel Ball* is the test that should be used whenever Congress defined the jurisdiction scope of a statute to be "navigable waters" and/or "waters of the United States."

Respectfully submitted,

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In the

Supreme Court of the United States

JOHN A. RAPANOS *et ex, et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' regulations promulgated pursuant to the Clean Water Act lawfully and constitutionally vest the Army Corps with broad, land-use decisionmaking authority over essentially any and every wetland in the United States.

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Agostini v. Felton,
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Arkansas v. Oklahoma Envtl. Prot. Agency,
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Atascadero State Hosp. v. Scanlon,
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Brown v. Board of Education,
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Carabell v. U.S. Army Corps of Engr's,
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City of Milwaukee v. Illinois & Michigan,
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Garcia v. San Antonio Metropolitan Transit Authority,
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Gonzales v. Raich,
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Gregory v. Ashcroft,
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Hess v. Port Auth. Trans-Hudson Corp.,
513 U.S. 30 (1994) 7, 15

Idaho v. Coeur d'Alene Tribe of Idaho,
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Illinois Central R. Co. v. Illinois,
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479 U.S. 481 (1987) 19, 20

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529 U.S. 848 (2000) 13

Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,
440 U.S. 391 (1979) 6, 15

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 16

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 11

National Mining Ass'n v. U.S. Army Corps of Eng'rs,
145 F.3d 1399 (D.C. Cir. 1998) 16

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 8

NRDC, Inc. v. Callaway,
392 F. Supp. 685 (D.D.C. 1975) 8

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 2, 3, 12, 15, 18, 20, 21, 23, 24, 25

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 26

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United States v. Morrison, 529 U.S. 598 (2000) 11, 12

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Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 18

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 7, 15

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40 C.F.R. § 230.20(b) 6

40 C.F.R. § 230.32(b) 6

Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003) 2

Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008 (Aug. 25, 1993) 13

Final Notice of Modification of Nationwide Permit 29 For Single Family Homes, 64 Fed. Reg. 47 (Aug. 30, 1999) 12

Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, repealed by 1972 Mass. Acts 784, § 2, superceded by Mass. Gen. Laws ch. 131, § 40 (1991) 8

Other Authorities

Adler, Jonathan H.,
Judicial Federalism and the Future of Federal Environmental Regulation,
90 IOWA L. REV. 377 (2005) 8

Adler, Jonathan H.,
Letting Fifty Flowers Bloom: Transforming The States Into Laboratories Of Environmental Policy
available at http://www.federalism project.org/masterpages/ environment/flowers.pdf 10

Adler, Jonathan H.,
The Fable of Federal Environmental Regulation: Reconsidering The Federal Role In Environmental Protection,
55 CASE W. RES. L. REV. 93 (2004) 10

Adler, Jonathan H.,
Wetlands, Waterfowl and The Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation,
29 ENVTL. L. 1 (1999) 7, 8

Albrecht, Virginia S. & Bernard N. Goode,
Wetland Regulation in the Real World (1994). 13

Dawson, Alexandra D.,
Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States
(Ass'n of State Wetland Managers, 1985) 8

Gerhardt, Michael J.,
The Curious Flight of the Migratory Bird Rule,
31 ENVTL. L. REP. 11079 (2001) 10

Jaffe, Caleb A.,
Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says About The Future Of Environmental Regulation,
20 VA. ENVTL L.J. 329 (2001) 10

Kusler, Jon A., *et al.*,
State Wetland Regulation: Status of Programs and Emerging Trends
(Ass'n of State Wetland Managers, 1994) 9

Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary,
104th Cong. (1996)
(statement of Robert McMackin) 9

Release No. PA-00-05, *U.S. Army Corps of Engineers Announces Replacement Nationwide Permits,*
available at http://www.hq.usace.army.mil/cepa/releases/nationwidepermits.htm 9

Revesz, Richard L.,
Federalism and Environmental Regulation: A Public Choice Analysis,
115 HARV. L. REV. 553 (200[illegible]) 9

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S. Rep. No. 92-414 (1971),
reprinted in 1972, U.S.C.C.A.N. 3668 17

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 States. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers. NFIB represents small employers who make up an important segment of the business community. Members typically have about five employees and report gross sales of $350,000; the average member nets $40,000 to $50,000 annually. These small businesses face challenges and opportunities that distinguish them from publicly traded corporations.

NFIB members have an important interest in these cases because small businesses continue to bear a disproportionate share of the federal regulatory burden associated with environmental regulations. A September 2005 study commissioned by the Small Business Administration reveals that environmental and tax compliance regulations are the main cost drivers in determining the severity of the disproportionate impact on small firms. Compliance with environmental regulations alone costs small firms 364 percent more than large firms.

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[1] Both petitioners and respondents have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The five years following *Brown v. Board of Education*, 349 U.S. 294 (1955), are often termed years of "massive resistance" to that decision's holding. In similar fashion, the five years following this Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), might be termed years of "passive resistance"—both to *SWANCC*'s holding itself and to any serious attempt to reconcile state with federal authority as regards wetlands protection and water-quality preservation. The Army Corps of Engineers ("Army Corps" or "Corps") initially considered making a good-faith attempt to reconcile its wetlands regulations with *SWANCC*'s statutory and constitutional teachings. *See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* 68 Fed. Reg. 1991 (Jan. 15, 2003). But in the end the Corps retreated from that objective; hunkered down with a modest redeployment of what was left of its pre-*SWANCC* legal position; and failed to make meaningful changes to its regulatory program. With the notable exception of the Fifth Circuit, the lower federal courts have acquiesced, consistently upholding applications of Army Corps regulations that *SWANCC* rendered unlawful.

These consolidated cases present a tailor-made opportunity for the Court to vindicate the authoritative status of *SWANCC* in particular and the binding nature of this Court's decisions more generally. In two separate but equally misguided rulings below, the Sixth Circuit failed to acknowledge that the fundamental assumptions underlying the Corps' regulations—not merely the regulatory provision aimed at migratory birds—were undermined by *SWANCC*. More specifically, the Sixth Circuit overlooked or ignored that *SWANCC* forecloses giving deference to the Corps' administrative interpretations and that the motive force

driving *SWANCC*'s result was this Court's constitutionally essential solicitude for preserving the States' prerogatives over land-use decisionmaking.

SWANCC drew a landmark jurisprudential line reconciling federal interests in the navigability and quality of "waters of the United States" with the States' concededly *exclusive* authority to make land-use decisions for wetlands, dry land, and other property outside the federal ambit. Noting the important federalism aspects of such a reconciliation, *SWANCC*'s reading of the Clean Water Act, while not comprehensive, established at a minimum that the Corps lacked land-use authority over "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168 (emphasis in original). The regrettable "passive resistance" to *SWANCC* has undoubtedly been caused in part by governmental chaffing at the bridle of law. But that resistance has also been partly caused by genuine confusion over what suffices to confer Clean Water Act jurisdiction. This submission, in addition to underscoring the practical importance of these cases to small businesses, seeks to dispel this confusion by defining and distinguishing the two types of constitutional and statutory authority the Army Corps exercises—a distinction that thus far has largely eluded the lower courts.

Courts have typically wandered astray by failing to appreciate that the Clean Water Act provision at issue here, section 404(a), governs "the *discharge* of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); (emphasis added). As *SWANCC* indicated, "*discharges* of dredged or fill material" can logically come in only two relevant varieties—(i) discharges directly involving highways of water-borne commerce, such as the Mississippi River System or St. Lawrence Seaway; and (ii) discharges involving, not great aquatic highways, but other "waters of the United States" used in interstate commerce. *See* 33 U.S.C. § 1362(7). This distinction,